

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
GREENVILLE DIVISION**

**LUCY EVON WILLIS, BEVERLY**

**G. WILLIS and CLARE MAE YATES      PLAINTIFFS**

**VERSUS      CIVIL ACTION NO. 4:00CV323-P-B**

**LIFE INSURANCE COMPANY OF GEORGIA**

**and JESSIE McCrORY, JR..      DEFENDANTS**

**MEMORANDUM OPINION**

This cause is before the Court on the plaintiffs' Motion to Remand. The Court, having reviewed the motions, the briefs of the parties, the authorities cited, and being otherwise fully advised in the premises finds as follows, to-wit:

**PROCEDURAL AND FACTUAL BACKGROUND**

This is a suit by Lucy Evon Willis, Beverly G. Willis and Clara Mae Yates arising out of alleged racial discrimination practiced by the Life Insurance Company of Georgia and its agents. Plaintiffs filed their suit in the Circuit Court of Leflore County, Mississippi on October 20, 2000. Defendants filed a timely Notice of Removal on November 20, 2000, alleging both federal question jurisdiction and diversity jurisdiction as grounds for removal. The plaintiffs, in turn, filed a Motion to Remand founded on a lack of subject matter jurisdiction. The matter has been fully briefed and the Court is ready to rule.

The Complaint names Life of Georgia and one of its agents, Jessie McCrory, as defendants and seeks recovery under various theories of state law: fraud, fraudulent inducement, breach of the duty of good faith and fair dealing, tortious breach of contract, breach of fiduciary duty, assumpsit, unjust enrichment, negligence and/or gross negligence, violations of Mississippi Code Annotated § 83-7-3 and

§ 75-24-1, and lastly, conversion.

Plaintiffs' Complaint enumerates several practices in which the corporate defendant and Jessie McCrory allegedly engaged, but its basic tenor is as follows: Life of Georgia and its agents sold small value insurance policies such as Industrial Life Insurance, Monthly Debit Ordinary Policies and Health Policies. All of these insurance products provided relatively modest benefits in exchange for the payment of small premium payments collected on a weekly, bi-weekly or monthly basis by insurance agents—like McCrory—who visited policyholders in person.

Life of Georgia allegedly targeted low-income, unsophisticated and minority segments of the population. The Complaint goes on to charge that the corporate defendant, by and through its agents, "routinely, knowingly and intentionally charged African-American individuals more for these insurance policies than it charged the similarly situated Caucasians" at first overtly and then later through racially discriminatory underwriting. The Complaint charges that "African-Americans were assigned to less favorable underwriting classifications and therefore paid higher premiums based on, among other things, their employment and occupations traditionally held by African-Americans and subjected [to] prejudicial classifications bearing no legitimate relationship to the actual mortality risks of African-Americans." The Complaint alleges that both Life of Georgia and its agent, Jessie McCrory, were motivated by discriminatory intent fueled by the desire for financial gain.

The plaintiffs further allege that the defendants knew that the target population was "unsophisticated with respect to insurance and related financial dealings or affairs," and that they were "ill-equipped to understand the unfamiliar and technical language of the Industrial Policies or the complex and sophisticated methods of determining premium payments." The Complaint also avers that both Life of Georgia and its agent, McCrory, knew that current and prospective policyholders would consider their premiums affordable and the benefits significant and attractive. Furthermore, although it was known to the defendants, they never disclosed to plaintiffs and other policyholders that over their normal life expectancies, premium payments would very likely exceed the face value of the policies.

Plaintiffs further allege that the Industrial Policies, in particular, were designed to provide little

cash value, no return of premium and no increasing death benefits (as contrasted with traditional whole life policies). These factors, in combination with anticipated mortality experience, resulted in Life of Georgia assuming no more than a de minimis risk which quickly dissipated over the duration of the policies.

The Complaint alleges that Life of Georgia furthered its allegedly tortious conduct by the manner in which it marketed, trained its agents to sell, and administered the "inferior" insurance products. In order to eliminate underwriting costs, the policies were issued in small face amounts and the agents sold multiple policies. Life of Georgia allegedly knew of the practice and condoned it in order to continue to realize excessive profits on the "worthless" policies.

Plaintiffs' Complaint also alleges that Life of Georgia induced plaintiffs and other policyholders to purchase policies by preparing and disseminating false and misleading information and sales materials through its agents, of whom McCrory was one. The Complaint specifically charges that McCrory was aware that the information being given to plaintiffs was false and misleading, but he nonetheless provided the information in order to enhance his financial gain.

The Complaint is also replete with allegations that the defendants, including McCrory, abused their superior position by cultivating the trust of the plaintiffs and other policyholders. The agents accomplished this aim by holding themselves out as skilled and knowledgeable in the field of insurance, especially as contrasted with the plaintiff's obvious lack of such skill and experience. McCrory and other agents also allegedly built personal relationships with plaintiffs and other policyholders, which in turn induced plaintiffs and others to repose trust and confidence in the "judgment" of McCrory and others like him, as reflected by the plaintiffs' decision to purchase Life of Georgia's products. Plaintiffs allege that the facts and circumstances gave rise to a fiduciary duty, of which the defendants, including McCrory, committed an egregious breach.

## LEGAL ANALYSIS

### I. Motion to Remand

#### A. Federal Question Jurisdiction - Artful Pleading Doctrine

Whether a case "arises under" federal law is determined by reference to the "well-pleaded complaint rule." The Fifth Circuit explained the rule in the following fashion:

Generally, under section 1331, a suit arises under federal law if there appears on the face of the complaint some substantial, disputed question of federal law. . . . Accordingly, to support removal, the defendant must locate the basis of federal jurisdiction in those allegations necessary to support the plaintiff's claim, ignoring his own pleadings and petition for removal. A defendant may not remove on the basis of an anticipated or even inevitable federal defense, but instead must show that a federal right is "an element, and an essential one, of the plaintiff's cause of action."

Carpenter v. Wichita Falls Indep. Sch. Dist., 44 F.3d 362, 366 (5<sup>th</sup> Cir. 1995)(citations omitted).

In the event a plaintiff asserts claims which have a basis in both federal and state law, the plaintiff as "master" of his complaint may decline to press his federal claims in favor of litigation premised exclusively on state law—effectively defeating the possibility of removal, but accepting the risk that his federal claim may one day be barred. Id. "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced. Merrell Dow Pharmaceuticals, Inc. v. Thompson, 478 U.S. 804, 809 (1986).

The singular exception to the well-pleaded complaint rule is the artful pleading doctrine. [I]n certain situations where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law. Although a defense, preemption may so forcibly and completely displace state law that the plaintiff's cause of action is either wholly federal or nothing at all.

Id. at 366 (emphasis added).

Plaintiffs specifically disavow any reliance on federal law as a basis for recovery. The Complaint itself reveals:

Plaintiffs bring this complaint solely under state law and not under federal law, and specifically not under the United States Constitution, or any of its amendments, or under 42 U.S.C. § 1981 or 1982, or any other federal statute, law, rule, or regulation. Plaintiffs believe and allege that a cause of action exists under the hereinafter set out state law claims for the conduct complained of herein. If this Court or the appellate courts of Mississippi were to rule that these plaintiffs have no cause of action under state law for the conduct set out herein, then these plaintiffs simply do not have any remedy, because these plaintiffs expressly waive and hereby disavow any claim for any relief whatsoever under any federal laws or any federal question concerning the allegations of this complaint, whether said allegations are pled or not.

Complaint at p. 3-4.

As is obvious from the foregoing excerpt, the complaint itself specifically denies that the relief sought is based on any federal law. Nonetheless, the defendants assert that plaintiffs' right of recovery turns entirely on constitutional and federal statutory prohibitions on racially discriminatory business practices, i.e., review of the allegations of plaintiffs' complaint necessarily reveals the federal character of the suit.

The Fifth Circuit's opinion in Waste Control Specialists, LLC v. Envirocare of Texas, Inc., 199 F.3d 781, 783 (5<sup>th</sup> Cir. 2000) makes it abundantly clear that the artful pleading doctrine does not apply in the absence of complete preemption. See also Garrett v. Hurley State Bank, Civil Action No. 3:99CV783WS (S.D. Miss. September 29, 2000). Stated plainly, only in situations where the federal legislation completely preempts state law is removal proper.

Defendants' assertion that recovery is dependent on plaintiffs' ability to establish a constitutional violation or other violation of federal law is inapposite. Defendants have cited no authority holding that Congressional enactments respecting racial discrimination were intended to completely preempt state tort law. After due consideration, this Court concludes that the artful pleading doctrine is inapplicable in this case. The removal is not supported by federal question jurisdiction.

B. Fraudulent Joinder

As a second ground for removal, defendants assert that the individual defendant, Jessie McCrory, has been fraudulently joined in an effort to defeat this Court's diversity jurisdiction. It is axiomatic that the party seeking removal bears the burden of proving the jurisdictional prerequisites. Where the basis for removal is diversity jurisdiction based on the allegation of fraudulent joinder, a defendant bears a heavy burden of establishing the right to a federal forum. The removing defendant must present clear and convincing evidence of fraudulent joinder in order to avoid remand. Rogers v. Modern Woodmen of America, 1997 WL 206757, \*2 (N.D. Miss. 1997).

There are three means by which a defendant can make the requisite showing of fraudulent joinder: First, a defendant may establish outright fraud in the plaintiff's pleading of jurisdictional facts. Second, a defendant can establish that there is no possibility of recovery under the facts pled in the complaint. Third, a defendant can establish fraudulent misjoinder where the facts pled are "so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability. Rogers at \*2.

Defendants rely on the second proposition; they contend that under the facts pled, and as supplemented by the record, there is no basis under Mississippi law for a recovery against McCrory. The existence of a cognizable claim is to be determined by reference to the allegations contained in the plaintiff's state court pleadings. Ironworks Unlimited v. Purvis, 798 F. Supp. 1261, 1263 (S.D. Miss. 1992). The Court is also free to pierce the pleadings by considering summary judgment-type evidence such as affidavits and deposition testimony. Carriere v. Sears, Roebuck and Co., 893 F.2d 98, 100 (5<sup>th</sup> Cir. 1990). However, in determining whether the joinder of a party was fraudulent, the district

court "must evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of fact in favor of the plaintiff." B., Inc. v. Miller Brewing Co., 663F.2d 545, 549 (5<sup>th</sup> Cir. 1981). Similarly, any uncertainties in the substantive law must also be resolved in favor of the plaintiff. Head v. United Ins. Co. of America, 966 F. Supp. 455, 457 (N.D. Miss. 1997).

Plaintiffs assert that the Complaint sets forth several viable theories of recovery against McCrory. The parties gave the most treatment in their briefs to fraud and/or fraudulent inducement, breach of duty of good faith/fair dealing, breach of fiduciary duty, and conversion. If a possibility of recovery exists under any of the above-referenced theories, then there is no fraudulent joinder and remand is necessary.

The Court finds it unnecessary to examine each of the alleged causes of action. In the instant case, the Complaint alleges facts, which if true, might support recovery under one or more of the state law theories advanced by plaintiff. Specifically, the Court notes that the defendant McCrory allegedly sold policies to one or more of the named plaintiffs and he admits in his affidavit that he recommended rates for policies based on the questionable criteria (i.e., employment) identified by the Complaint. The Court further notes that the affiant made no attempt to disavow either knowledge or involvement in targeting his sales toward unsophisticated segments of the population (black or otherwise) and completely ignores the additional allegations respecting the inferiority of the products offered in relation to the premiums exchanged by the policyholders for the coverage. Viewing the facts and all ambiguities of state law in the light most favorable to the plaintiff, the foregoing, the Court cannot say that there is "no possibility" of recovery under the fraud and breach of fiduciary duty claims raised in the Complaint.<sup>1</sup> Hart v. Bayer Corporation, 199 F.3d 239 (5<sup>th</sup> Cir. 2000). Furthermore, McCrory's alleged involvement in collecting premium payments and earning a commission therefrom sufficiently

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<sup>1</sup> The Court makes no comment on the likelihood of recovery by plaintiffs as to the other state law theories upon which they base their demand relief.

distinguishes this case on its facts from that of Gossett v. Cooper Industries, Civil Action No. 4:99CV13-P-B (October 19, 2000), insofar as concerns the possibility of recovery on the conversion claim. Again, the test is not whether a plaintiff will recover, or even whether she will "probably" recover, but whether she "might" recover.<sup>2</sup> In such a situation, this Court is under a duty to remand the action to state court.

## II. Motion for Attorneys' Fees

Title 28, section §1447(c) permits a Court, in its discretion, to assess costs and expenses, including attorneys fees for an improvident removal. The Court finds that the circumstances of this case do no warrant such an award. Accordingly, the plaintiffs' Motion for Attorneys' Fees should be denied.

## CONCLUSION

Based on the foregoing analysis, the Court finds that the plaintiffs' Motion to Remand is well-taken and should be granted. However, the accompanying Motion for Attorneys' Fees is not well-taken and should be denied. An Order will issue accordingly.

This, the \_\_\_\_\_ day of May, 2001.

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W. ALLEN PEPPER, JR.  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> The Court further finds that the pleading deficiencies argued by defendants are an insufficient ground upon which to base a finding of fraudulent joinder. See Hart v. Bayer Corporation, 199 F.3d 239, 248 n. 6 (5<sup>th</sup> Cir. 2000) Furthermore, the defendants' laches and statute of limitations arguments are more properly addressed by way of a motion for summary judgment before the state court, especially in view of the plaintiffs' position that the defendants' alleged fraudulent concealment tolled the applicable statutes of limitations.